Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LOUIS MALPESO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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85 pp

QUESTIONS PRESENTED

1. Whether the Trial Court violated defendant's right to present a defense when it erroneously barred proof (a) that a key figure in the trial testimony was actually a government informant, and (b) that the lead FBI agent assigned to this case was under criminal investigation for his corrupt relationship with the informant?

2. Whether defendant's sentence must be vacated because U.S.S.G. § 1B1.2(d) is unconstitutional – an issue that (a) has split the Courts of Appeals, and (b) this Court has already agreed to resolve in *Edwards v. United States*, 118 S.Ct. 334 (1997)?

LIST OF PARTIES

Petitioner was indicted with Anthony Liberatore, Christopher Liberatore, Joseph Amato and Robert Gallagher. After the Liberatores became cooperating witnesses, petitioner stood trial with Amato and Gallagher. In a different trial, Amato was also convicted under a separate indictment.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Louis Malpeso respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, affirming his conviction and 95 year sentence for four counts of violating or conspiring to violate 18 U.S.C. § 1959 ("Violent Crimes in Aid of Racketeering"); two counts of violating 18 U.S.C. § 924(c)(1) (using or carrying a firearm during a crime of violence); and one count of being a felon in possession of a firearm (18 U.S.C. §§ 922(g)(1), 924(a)(2)).

Opinion Below

The Court of Appeals' opinion, *United States v. Malpeso*, 115 F.3d 155 (2d Cir. 1997), appears at 1a.[1]

Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Second Circuit denied Malpeso's rehearing petition on October 3, 1997. (30a-31a) On December, 22, 1997, Justice Ginsburg granted Malpeso's motion for a 30 day extension, to January 31, 1998, of his time to petition for *certiorari*. (32a-37a) Due to, *inter alia*, a medical emergency in counsel's family, Malpeso moved, on January 20, 1998, for an additional 30 day extension pursuant to this Court's Rule 13.5. (38a-41a) Receiving no decision, counsel instructed his office manager, on February 10, to call this Court for further inquiry. In response, Deputy Clerk Loretta S. Ruffin told counsel's office manager that the motion for an additional 30 day extension had been denied on January 22, nine days before the petition's due date. Thus, had counsel received timely notice of the denial, the January 31 deadline still could have been met. However, as evidenced by this Court's "Notification List" – faxed by Ms. Ruffin, at counsel's request, on February 11 – notice of the denial was sent to counsel's old office address, and never forwarded to the current address. (44a) This petition therefore is, inevitably, some two to three weeks out of time.

Given this unique factual scenario, we respectfully ask this Court to waive the time requirement and decide the petition on the merits. *See* R. Stern, E. Grossman, S. Shapiro & K. Geller, *Supreme Court Practice*, 282 (7th ed. 1993) and cases cited there. We make this request because (a) the untimeliness stems from a technical glitch beyond Malpeso's control; (b)

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[1] Numbers followed by "a" refer to pages of the Appendix to this petition. Numbers preceded by "A:" refer to pages of the Joint Appendix in the Court of Appeals. Numbers preceded by "T:" refer to pages of the trial transcript not included in the Joint Appendix.

Malpeso has substantial claims on the merits; (c) he faces a **95 year sentence**; (d) the lateness is very slight; (e) this petition follows promptly after the belated revelation of the clerical error; and (f) time limits are not jurisdictional in criminal cases. *See Schacht v. United States*, 398 U.S. 58, 63-64 (1970); *Sanabria v. United States*, 437 U.S. 54 (1978). Indeed, in the circumstances of this case, we respectfully submit that any other result would work manifest injustice to Malpeso, and could not be harmonized with traditional notions of fundamental fairness.

Constitutional and Statutory Provisions

The constitutional and statutory provisions involved in this petition appear at 47a-51a. They are as follows:

FED. R. EVID. 401, 403

18 U.S.C. §§ 922(g)(1), 924(a)(2), 924(c)(1), 1959

U.S. CONST. AMENDS. V, VI

U.S.S.G. § 1B1.2(d) and APPLICATION NOTE 5

Jurisdiction in the District Court

The United States District Court for the Eastern District of New York (Dearie, D.J.) had jurisdiction under, *inter alia*, Title18, United States Code.

Statement of the Case

This is a case like none the Court has ever seen. After all, how often does the head of an FBI investigation himself come under criminal investigation for misconduct in the very case before the Court? Even more remarkable, Supervisory Special Agent Lindley R. DeVecchio's corrupt alliance with informant Gregory Scarpa is not only **conceded by the government**, but goes to the question at the very heart of the case: whether or not there was, in fact, a "War" within the alleged Colombo Crime Family? *See, e.g., United States v. Orena*, 32 F.3d 704 (2d Cir. 1994); *United States v. Brady*, 26

F.3d 282 (2d Cir.), *cert. denied*, __ U.S. __, 115 S. Ct. 246 (1994) (both describing alleged Colombo Family "War").

Specifically, the *sine qua non* of the present prosecution was the government's claim that defendant Louis Malpeso participated in certain murders and murder conspiracies, and possessed guns in that connection, as part of a factional "War" for control of the Family. In contrast, Malpeso sought to defend on the theory (a) that there was **no** such "War," but only a coup by DeVecchio and Scarpa, and thus (b) that the shootings were committed, and the guns were possessed, solely for defensive purposes, rather than to Amaintain or increase" position in the Family, as required by the statute in question, 18 U.S.C. § 1959.

Yet, in barring **all** evidence of Agent DeVecchio's illicit relationship with Scarpa, the Trial Court deprived Malpeso of an opportunity to present this defense. To compound that error, the government unfairly exploited the Court's ruling by making factual assertions that the evidence would have rebutted. In these circumstances, with the theory of prosecution unchallenged, Malpeso's conviction was a foregone conclusion.

In two prior "Colombo War" trials, where proof concerning the Scarpa-DeVecchio affair was **admitted** in whole or in part, the juries accepted the defense position that there **was no** "War" and **acquitted** all defendants – tribute to the evidence's astonishing potency. *United States v. Cutolo*, 93 Cr. 1230 (EHN) (E.D.N.Y.); *United States v. Victor M. Orena*, 93 Cr. 1366 (ERK) (E.D.N.Y.). In this case, in identical circumstances, Malpeso sought to offer the **very same evidence and argument**. Unaccountably, however, the Trial Court flatly rebuffed that effort. As a result, the jury voted a partial **conviction**, and Malpeso will die behind bars. There is something viscerally troubling about this incongruity.

Statement of Facts

I. INTRODUCTION

Unlike so many other alleged "organized crime" cases, the murder prosecution of Louis Malpeso was **not** founded upon the defendant's own tape-recorded words. Rather, the government relied upon accomplice testimony by the triggermen themselves: Anthony and Christopher Liberatore, a father-son team of career con men and Mafia "wannabes" with every reason falsely to accuse Malpeso.

Even more than most, the Liberatores were singularly ill-suited for the role of cooperating witnesses. Indeed, their testimony was so evasive, and they were so incapable of getting their stories straight, that the government took the extraordinary steps of (a) completely renouncing Anthony Liberatore in summation, (b) disavowing significant parts of Christopher Liberatore's testimony as inconsistent with the minimal, non-accomplice proof, and (c) totally recasting its theory and constructing a revisionist hypothesis of events in a last gasp effort to save the case.

It is hardly surprising, then, that **the jury deadlocked with respect to substantial portions of the indictment**. Thus, while we do not challenge the sufficiency of the evidence, there can be no doubt that this was an extremely close case – one in which the improperly excluded "Scarpa-DeVecchio" proof could, and probably would, have tipped the balance.

At bottom, Malpeso's prosecution resolved into a simple murder case. The trial evidence focused primarily upon two events: (i) the December 8, 1991 killing of Matteo Speranza, by Christopher Liberatore with the aid of his father; and (ii) the June 4, 1992 shooting of Thomas McLaughlin and Daniel Norden, by Christopher Liberatore and, allegedly, codefendant Robert Gallagher. Significantly, the jury **failed to reach agreement** on the counts involving the Speranza homicide. As such, the verdict turned upon the **single criminal episode** of the McLaughlin/Norden shootings.

II. THEORIES OF PROSECUTION AND DEFENSE

A. *THE GOVERNMENT'S THEORY*

The government's trial theory was very straightforward. In essence, it sought to portray the victims as casualties of a larger "War" between two factions fighting for control of the Colombo Family: the Orena side and the Persico side. More precisely, the government alleged that Malpeso was a "made member" or "soldier" of the Family, allied with the Orena camp. As part of the Orenas' "War" effort, Malpeso supposedly ran a "crew" of Aassociates" or aspiring members – including, for a time, both Liberatores. According to the government's theory, this "crew" was, in fact, a roving hit squad that regularly hunted for Persico loyalists, but rarely, if ever, located any. In his supervisory capacity, Malpeso allegedly (i) directed the Liberatores to carry out the Speranza killing, and (ii) was present for, and gave Christopher Liberatore a gun used in, the McLaughlin/Norden shootings. (*See generally* A: 61-71)

Hence, the government's theory sounded in vicarious liability. There was no dispute that the Liberatores themselves – and particularly Christopher Liberatore – actually committed the shootings on trial. Nonetheless, the government sought to impute those shootings to Malpeso upon the Liberatores' claim that Malpeso had, in effect, put the gun in their hands and ordered them to pull the trigger. This being so, the case rose and fell on the Liberatores' credibility. As the prosecutor herself argued to the jury: "If you believe Chris Liberatore ..., then you'll convict.... If he's lying ..., then you acquit." (T: 2847, 2955) These facts have determinative impact on any harmless error inquiry.

B. *MALPESO'S THEORY*

Stripped of the "Scarpa-DeVecchio" evidence, Malpeso could not meet the government's "War" theory head on, and thus was relegated to attacking the Liberatores' credibility. To this end, he assailed them as professional con artists who were setting him up to deflect blame from themselves and curry

favor with the government. In support of this view, cross-examination showed that the Liberatores relentlessly contradicted each other, their prior trial testimony and debriefing statements. Accordingly, Malpeso argued that they had changed their stories with an eye toward (i) securing convictions; (ii) tailoring their testimony to achieve maximum congruity and minimum inconsistency; and (iii) insulating their immediate family members, whom they had recklessly enmeshed in their crimes, from prosecution.

III. THE MCLAUGHLIN/NORDEN SHOOTINGS

Given the hung jury on the counts regarding the Speranza murder, the key to the verdict was a single shooting episode that occurred on June 4, 1992, in a park near Avenue P in Brooklyn. According to Christopher Liberatore, the incident unfolded as follows:

> A. Allegedly, Chris Liberatore, Malpeso, Gallagher, Joe Scopo and Sal Miciotta drove to the park to hunt for Persico loyalist Thomas McLaughlin. (T: 512-13)
>
> B. On the way, Malpeso allegedly Ahanded [Chris Liberatore] a" gun – specifically, "a Davis .380" – and "said if anything happened [he (Chris Liberatore)] and Bobby [Gallagher] were going to be the shooters." (T: 513)
>
> C. Upon arrival, Chris Liberatore and/or Gallagher allegedly shot McLaughlin in the shoulder. (T: 513-25)
>
> D. In addition, errant bullets seriously, but not mortally, wounded Daniel Norden, a bystander. (*Id.*)
>
> E. Afterwards, Chris Liberatore disposed of the Davis .380 in a nearby sewer. (T: 514-15)

With respect to this episode, the government claimed that Malpeso "Aaided and abetted th[e] ambush by providing one

of the guns that was used." (T: 2950) As to Malpeso, then, there were two questions for the jury to answer: **first**, whether he was present and, **second**, whether he gave Chris Liberatore a gun? There were serious problems with both of these propositions. As the government itself conceded, the A**evidence [wa]s inconsistent with what [Christopher Liberatore] testified to.**" (T: 2943) (Emphasis supplied)

First, the **sole** corroboration for Malpeso's presence was the testimony of a **single** eyewitness, Lisa Lindley. And she swore that the only person even remotely resembling Malpeso sat in the **front** seat, rather than the **back**, as Chris Liberatore had maintained. (T: 512, 2009, 2951)

Second, the **lone** gun recovered from the sewer was a **Bryco Arms, not** a Davis .380, as Chris Liberatore had insisted. (T: 933-35, 2953)

Third, contrary to Chris Liberatore's claim that he "fired into the ground and the bullet must have ricochet[]ed" and hit Norden, eyewitness Steven Hoff testified that he saw Chris Liberatore raise his gun, aim and fire directly into the crowded park. (T: 931-33, 2309-13, 2949, 3137-38) This was further proof that Chris Liberatore was lying to minimize his culpability and bolster his own credibility with the jury. Indeed, even the prosecutor was forced to admit that Hoff's testimony was "[p]lainly ... inconsistent with what both Lisa Lindley ... and Christopher Liberatore t[old] you." (T: 2949)

Fourth, whereas Chris Liberatore testified that the alleged shooters Apulled up next to" McLaughlin's car and fired, Lindley said that they fired from "behind." (T: 513, 2010, 2944-46) Thus, "although [she] contradict[ed] Chris Liberatore in terms of when the first shot was fired," the government was left to speculate that Lindley must have been "right" and Chris Liberatore "wrong" on this score, in that his version would have made for "an odd angle" of trajectory and an A[un]likely pattern of ricochet" with respect to Norden. (T: 2944-45)

Fifth, while Chris Liberatore claimed that Gallagher fired the first shot, Hoff maintained that it was Chris Liberatore who shot first. (T: 513, 2293-2300, 3135)

Sixth, while Chris Liberatore said that Gallagher was in the back seat and he was in the middle, Hoff testified that Chris Liberatore fired from the **front** seat. (T: 512, 2947, 2951-52, 2293-3300, 3135) The government sought to explain this discrepancy by contending that "Steve Ho[ff] is wrong about what seat Chris Liberatore came out of." (T: 2952) On cross-examination, however, it was Chris Liberatore who confessed that he could not have been sitting in the middle of the back seat because his shots would have hit Gallagher in the face. (T: 923)

Seventh, as the prosecutor herself acknowledged, the physical evidence was tainted because the investigating officers deviated from standard "procedure and regulations." In particular, shell casings were disturbed and perhaps lost, and no crime scene photographs were taken. (T: 2036-38, 2942)

Hence, as conceded by the government itself, there were major "variations between what the eyewitness[es] testified to ... and what Chris Liberatore testified to" in connection with the McLaughlin/Norden shootings. (T: 2939) Rarely has a **95 year** sentence rested upon such thin evidence.

Reasons For Granting The Petition

I. THE TRIAL COURT VIOLATED DEFENDANT'S RIGHT TO PRESENT A DEFENSE WHEN IT ERRONEOUSLY BARRED PROOF (A) THAT THE KEY PLAYER IN THE ALLEGED "COLOMBO FAMILY WAR" WAS ACTUALLY A GOVERNMENT INFORMANT, AND (B) THAT THE LEAD FBI AGENT ASSIGNED TO THIS CASE WAS UNDER CRIMINAL INVESTIGATION FOR HIS CORRUPT RELATIONSHIP WITH THE INFORMANT

A. *INTRODUCTION*

In this **POINT**, we challenge the Trial Court's refusal to admit evidence of an extraordinary law enforcement debacle: proof that (i) the most active and violent participant in the alleged "Colombo Family War," Gregory Scarpa, Sr., was actually a government informant, and (ii) the supervising FBI agent assigned to this case, Lindley R. DeVecchio, was under criminal investigation for his illicit dealings with Scarpa. Armed with this compelling and **undisputed** evidence, the *Cutolo* and *Victor M. Orena* defendants won complete **acquittals**. Yet, in **identical circumstances** here, Judge Dearie somehow found the same arguments and evidence to be irrelevant, wholly excluded them, and the jury returned a partial **conviction**. In our view, there can be only one explanation for this radical divergence: the Trial Court – and later, in affirming for substantially similar reasons, the Court of Appeals – usurped the role of the jury and made an improper credibility determination. *See, e.g., DiBlasio v. Keane*, 932 F.2d 1038, 1043 (2d Cir. 1991) (Credibility of defense "is a question reserved for the **jury** as fact-finder") (Citation omitted) (Emphasis supplied).

B. *AN OVERVIEW OF THE GOVERNING LAW*

Several familiar legal principles inform our arguments in this **POINT**.

First, "the Constitution guarantees criminal defendants the right to present a defense," *United States v. Blum*, 62 F.3d 63, 67 (2d Cir. 1995) (*citing United States v. Almonte*, 956 F.2d 27 (2d Cir. 1992); *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038 (1973)), to **every** element of the charges against them. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970) (Due Process requires "proof beyond a reasonable doubt of every fact necessary to constitute" the charged offense).

Second, as a corollary of this fundamental right, "[a] criminal defendant is entitled to a jury charge that reflects **any** defense theory for which there is a foundation in the evidence." *United States v. Johnson*, 994 F.2d 980, 988 (2d Cir.), *cert. denied*, 510 U.S. 959, 114 S. Ct. 418 (1993) (*citing United States v. GAF Corp.*, 928 F.2d 1253, 1262 (2d Cir. 1991)) (Emphasis supplied).

Significantly, questions as to the plausibility of a defense theory go to weight rather than admissibility, and thus are for the **jury** as opposed to the Court. Hence, the issue is **not** whether the Trial Court would credit the defense theory were it sitting as the trier-of-fact, but merely whether the defense theory constitutes a permissible inference that **might** be drawn by a rational jury. In other words, "a criminal defendant is entitled to instructions relating to his theory of defense, for which there is **some** foundation in the proof, **no matter how tenuous that defense may appear to the trial court**." *United States v. Dove*, 916 F.2d 41, 47 (2d Cir. 1990) (Emphasis supplied); *see, e.g., United States v. Pedroza*, 750 F.2d 187, 205 (2d Cir. 1984) ("'[a] criminal defendant is entitled to have instructions presented relating to **any theory** of defense for which there is **any** foundation in the evidence, **no matter how weak or incredible that evidence may be**'") (*quoting United States v. O'Connor*, 237 F.2d 466, 474 n.8 (2d Cir. 1956)) (Emphasis supplied).

Third, for pretrial purposes, an offer of proof, such as that made by Malpeso below, serves as the functional equivalent of evidence, and – unless insupportable on its face – must be

accepted as true. *See, e.g., United States v. Mejias*, 552 F.2d 435, 443 (2d Cir.), *cert. denied*, 434 U.S. 847, 98 S. Ct. 154 (1977) (District Court properly "accepted the facts as stated in appellants' offers of proof as true").

Fourth, evidence offered by an accused for defensive purposes, *e.g.*, to negate an element of the offense, is governed by an **easier** admissibility standard than prosecution evidence. Specifically, prejudice under Rule 403 is **not** a factor in such circumstances. *See, e.g., United States v. Aboumoussallem*, 726 F.2d 906, 911-12 (2d Cir. 1984); *Government of the Virgin Islands v. Carino*, 631 F.2d 226, 230 (3d Cir. 1980) ("[E]vidence produced by the defense cannot have a prejudicial effect to the defendant, and there should be no balancing of prejudice to the prosecution") (Citations and internal quotes omitted).

Fifth, it is well-settled that the issue of a witness' bias and motive is "**always** relevant," *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110 (1974) (Emphasis supplied) (Citation and internal quotes omitted), **never** "collateral," and thus subject to proof by "extrinsic evidence." *United States v. Harvey*, 547 F.2d 720, 722 (2d Cir. 1976).

With this analytical framework in mind, we turn to the substance of our argument.

C. *THE NATURE OF THE "SCARPA/DEVECCHIO" EVIDENCE*

Scarpa, a Colombo Family captain allegedly aligned with the Persico camp, was a pivotal figure in the supposed factional war. Simply put, he was at the center of the war's landmark events. For example, in June of 1991, Scarpa's closest associate and protégé, Carmine Sessa, shot at alleged Orena faction leader Victor J. Orena himself, touching off a long, hot summer of simmering tension in the Family. (*See, e.g.*, T: 222-30; A: 128) Then, in November of 1991, Scarpa became the first casualty of the war's "shooting phase," surviving an alleged attempt on his life by the Orena side. (*See, e.g.*, T: 262; A: 129) Over the next year or so, Scarpa killed or

attempted to kill no less than **14** of Orena's alleged allies – crimes that the government sought to attribute to the Persicos. (A: 126) These included at least four murders, as well as **numerous attempts to murder Malpeso himself**. (A: 74-75, 91, 102-05, 141) Thus, as even the prosecutor allowed, "**Greg Scarpa was a very active participant in the war. He was by far the most vicious killer during the war**." (A: 139) (Emphasis supplied)

Malpeso's **uncontroverted** offer of proof as to Scarpa and Agent DeVecchio consisted of, *inter alia*, the following:

1. *The Pre-"War" Years*

Scarpa had been a valuable informant since at least the early 1960s. With the FBI's knowledge and assistance, he murdered, stole, loansharked, counterfeited, extorted and dealt drugs all the while. (A: 73-74, 109-116, 155)

2. *Facts Common To Both The Pre-*"War" And The "War"Years

It was a widely held belief within the Family that Scarpa was an informant, and/or that he had a law enforcement source. (A: 108-16, 125)

3. *The "War" Years*

a. **Knowing full well that Scarpa was actively murdering alleged Orena supporters, Agent DeVecchio not only failed to arrest him, but fed Scarpa the address of Victor J. Orena himself, as well as those of other alleged Orena loyalists – a virtual license to kill.** In addition, Agent DeVecchio advised Scarpa that certain of Orena's supposed followers were forming Ahit teams." Predictably, Scarpa used this confidential information to stalk, and in some cases shoot, the individuals in question. (A: 76, 111)

b. In February 1992, case agent Christopher Favo, who sat at the prosecution's table and testified

at trial, heard Agent DeVecchio tell Scarpa that one of Scarpa's supposed confederates, Carmine Imbriale, was cooperating with law enforcement, thus compromising Imbriale's safety. (A: 76, 146-48)

c. In or about March through August 1992, agents Favo and DeVecchio intervened to save Scarpa from arrest on a New York State gun charge. Meanwhile, Scarpa remained at large and continued his killing spree. (A: 91-22, 136-37, 148-49, 151)

d. Agent DeVecchio asked Agent Favo to provide him with addresses for certain individuals. Agent Favo later learned that these individuals were Scarpa's loansharking victims. Agent DeVecchio gave the addresses to Scarpa, thereby aiding Scarpa's loansharking activities. (A: 76)

e. After Agent DeVecchio learned that Scarpa had killed yet another alleged Orena victim, Agent Favo saw Agent DeVecchio "slap[] his hand on the desk" and exclaim in "excite[ment]," "[w]e're going to win this thing [i.e., the 'War']." (A: 76, 91, 134, 150) (Emphasis supplied)

f. Fully aware that they had assisted Scarpa in several murders, Agent DeVecchio nonetheless warned Scarpa that there were outstanding arrest warrants for Scarpa crew members Lawrence Mazza and James DelMasto. Thereafter, Scarpa told Mazza and DelMasto, then fugitives, to stay away. And, of course, Agents DeVecchio, Favo and their colleagues still took no steps to apprehend Scarpa himself. (A: 76, 151)

g. On or about June 26, 1992, Agent DeVecchio – incensed that Scarpa had almost been arrested by local police – directed Agent Favo and the rest of the "Colombo Squad" to suspend all further arrests without his express permission. (A: 152)

> h. In violation of Justice Department rules, Agent Favo and his brother agents waited a full 18 months, until January 1994, to report Scarpa's and Agent DeVecchio's misconduct. Their belated disclosures prompted internal and criminal investigations. (A: 76, 108, 137-38, 155-56)
>
> ***

This evidence speaks for itself. Plainly, Agent DeVecchio was indelibly compromised by his relationship with Scarpa. In short, Agent DeVecchio – and, to a somewhat lesser extent, Agent Favo and the other members of the "Colombo Squad" – abdicated their professional responsibilities and personally injected themselves in the alleged "War." At best, they closed their eyes to Scarpa's violence and let him wreak havoc. At worst, they served as silent but deadly partners in his mayhem by keeping him out of jail and on the streets; **leaking the identities and locations of potential murder victims and cooperating witnesses**; and generally obstructing justice. As we show *infra*, Malpeso could have used this proof to devastating advantage – an advantage that carried the day in the *Cutolo* and *Victor M. Orena* trials.

D. *THE RULINGS BELOW*

With only the barest explanation, the Trial Court granted the government's *in limine* motion to preclude the "Scarpa/DeVecchio" evidence, holding that it was (i) irrelevant under Rule 401, and (ii) otherwise inadmissible under Rule 403. Accordingly, the Court directed Malpeso "to make no reference to Mr. Scarpa's status as an informant, his status as an informant to the FBI, or any reference to any of the matters that are currently presumably the subject of intense investigation elsewhere." (A: 174) On appeal, the Second Circuit affirmed on substantially identical grounds. (10a-14a) As we now explain, neither of the articulated reasons for excluding the "Scarpa/DeVecchio"proof – irrelevance or unspecified Rule 403 concerns – can withstand scrutiny.

E. *THE REASONS WHY THE LOWER COURTS ERRED*

1. *THE EVIDENCE WAS RELEVANT AND ADMISSIBLE UNDER RULE 401*

Contrary to the lower courts' view, Malpeso advanced several cogent theories of relevance for the "Scarpa/DeVecchio" proof – theories that persuaded at least two other courts to permit the evidence, and should have prevailed here, as well.

a. *THE EVIDENCE WAS RELEVANT TO ESTABLISH THE THEORY OF DEFENSE*

Malpeso first argued that the AScarpa/DeVecchio" proof was relevant to support a defense of self-preservation and lack of intent – the very defense that **won** the *Cutolo* and *Victor M. Orena* cases. In substance, the argument and the prospective defense went as follows:

> i. Section 1959 of Title 18, United States Code, requires a showing that the defendant acted "**for the purpose of ... maintaining or increasing position in an enterprise engaged in racketeering activity**," here, the Colombo Family. 18 U.S.C. § 1959 (Emphasis supplied).
>
> ii. Emboldened by his relationship with Agent DeVecchio, Scarpa believed that he could kill with impunity – a belief that manifested itself in his voracious appetite for brutality.
>
> iii. Scarpa's informant status, and/or the fact that he had a law enforcement source, were "common knowledge" within the Family. (A: 108-16, 125) Accordingly, such knowledge could be imputed to Malpeso as an alleged member of the Family. *See United States v. Certain Real Property and Premises, Known as 890 Noyac Road, Noyac, New York*, 945 F.2d 1252, 1260 (2d Cir. 1991) (Evidence of occupant's general reputation as a drug deale

properly admitted to establish landowner's knowledge of occupant's drug sales, despite absence of proof that landowner knew of the reputation in general or the sales in particular).

iv. To that extent, it could be inferred that Malpeso knew of Scarpa's belief that he had *carte blanche* to kill. And, when coupled with Scarpa's demonstrated ability and willingness to carry out that belief, such knowledge frightened Malpeso. *See United States v. Russo*, 708 F.2d 209, 214 (6th Cir.) (evidence of defendant's general mafia reputation properly admitted to establish extortion victim's state of fearfulness), *cert. denied*, 464 U.S. 993, 104 S. Ct. 487 (1983); *United States v. Tropiano*, 418 F.2d 1069, 1081 (2d Cir. 1969) (bad reputation evidence properly admitted to show extortion victim's fear), *cert. denied*, 397 U.S. 1021, 90 S. Ct. 1258 (1970). **This was especially so because Malpeso had been the target of murder attempts by Scarpa**. (A: 103-05, 141)

THEREFORE:

v. Malpeso acted out of fear – *i.e.*, to protect himself from Scarpa and his cohorts – and **not** to Amaintain or increase" his position in the Family, as required by the statute. As Judge Dearie himself put it, "**we're interested in staying alive. That's the defense, and that's our sole motivation.... [And] [i]f they [defendants] are not motivated by maintaining or increasing their position, you [the government] have no case**." (A: 124, 127) (Emphasis supplied)

While the present circumstances are *sui generis*, there is strong authority for the proposition that the "Scarpa/DeVecchio" evidence should have been admitted (i) to establish the self-preservation defense, and (ii) to negate § 1959's intent element. *United States v. McClure*, 546 F.2d 670 (5th Cir. 1977), is strikingly on point. There, as here, McClure asserted that he was "**terrified**" of an **informant**, Carroll, and likewise sold drugs only "because he was **afraid** not to" do so. *Id.* at 672 (Emphasis supplied). Nonetheless,

the trial court barred testimony that Carroll "had **intimidated** [others] into selling" drugs, rejecting McClure's identical claim "that it was **relevant to prove [his] lack of intent**...." *Id.* at 671, 672 (Emphasis supplied). In peculiarly apt language, the Fifth Circuit reversed, holding that

> **evidence of a systematic campaign of threats and intimidation against other persons is admissible to show lack of criminal intent by a defendant**.... [I]n the case before us it was the defendant who sought to introduce evidence of the **informant's scheme. His right to present a vigorous defense required the admission of the proffered testimony**. The fact that it referred exclusively to threats made by Carroll after the sales by appellant affects its **weight but not its admissibility**.
>
> **We intimate no opinion as to the credibility of appellant's ... defense. We decide only that a jury could not properly convict him absent the opportunity to hear the proffered testimony bearing upon his theory of defense** and weigh its credibility along with the other evidence in the case.

546 F.2d at 672-73 (Emphasis supplied) (Footnote omitted).

Hence, under Rule 401's liberal and generous standard, evidence is *per se* relevant – though not necessarily admissible given Rule 403's balancing hurdle – where, as here, it is offered to rebut an element of the crime, such as intent. *See Old Chief v. United States*, 117 S. Ct. 644, 649-50 (1997); *Montana v. Egelhoff*, 116 S. Ct. 2013, 2016-17 (1996). As in *McClure*, evidence of Scarpa's "systematic campaign of threats and intimidation," 546 F.2d at 672 – driven by Agent DeVecchio's corrupt assistance – would have done just that.

In ruling otherwise, Judge Dearie necessarily must have delved into the "credibility" of the self-preservation defense – a question of "weight but not ... admissibility," which is off limits for the Trial Court. *McClure*, 546 F.2d at 673. Accordingly, *McClure* alone compels the conclusion that Malpeso's

"right to present a vigorous defense required the admission of the proffered testimony," as it was quintessentially relevant. *Id.*

Accepting this argument, Eastern District Judge Edward Korman not only received the Scarpa/DeVecchio evidence in the *Victor M. Orena* trial, but gave the jury an explicit instruction on the Aself-preservation/no intent" defense. (A: 88, 92) (Emphasis supplied)

By virtue of his presumptively truthful offer of proof, Malpeso plainly would have been entitled to a similar instruction here – *i.e.*, one that "specifically enunciated the[] defense theory." *Pedroza*, 750 F.2d at 204. Indeed, Malpeso requested such a charge, but, absent the "Scarpa/DeVecchio" proof, there was no evidentiary basis for one. (T: 2739-42, 2791-92)

Thus, beyond its refusal to permit proof and argument on the "Scarpa/DeVecchio" issue, the Trial Court exacerbated its error by denying Malpeso Athe opportunity" to seek a jury instruction "bearing upon [his self-preservation/no intent] theory of defense." *McClure*, 546 F.2d at 673. In combination, these errors eviscerated Malpeso's right to present a defense, and rendered his trial fundamentally unfair – especially relative to those of the **acquitted** defendants in Cutolo and Victor M. Orena.

b. *THE EVIDENCE WAS RELEVANT TO DISCREDIT THE INVESTIGATION AND EXPOSE THE TESTIFYING AGENTS' BIAS AND MOTIVE*

In addition, Malpeso argued that the "Scarpa/DeVecchio" evidence was admissible (i) to impeach the quality of the government's investigation, and (ii) to establish the bias and motive of the FBI agents who testified against him. As noted, these traits are "**always** relevant," *Davis v. Alaska*, 415 U.S. at 316, 94 S. Ct. at 1110 (Emphasis supplied) (Citation and internal quotes omitted), **never** "collateral" and thus subject to proof by "extrinsic evidence." *Harvey*, 547 F.2d at 722.

Inexplicably, the Second Circuit's opinion completely ignored this claim.

Obviously, as discussed above, the "Scarpa/DeVecchio" evidence raises serious questions about the conduct of the investigation's crucial figures: supervisor DeVecchio, and case agent Favo, who sat at the prosecution's table and was knee-deep in his superior's misdeeds. *A fortiori*, then, the evidence would have cast grave doubt on the integrity of the investigation as a whole. As such, it would have fueled a blistering cross-examination of **all** the "Colombo Squad" agents who testified at trial, and of case agent Favo in particular.

As this Court has recently reaffirmed, a "'common trial tactic of defense lawyers is to discredit the caliber of the investigation.'" *Kyles v. Whitley*, 115 S. Ct. 1555, 1572 (1995) (*quoting Bowen v. Maynard*, 799 F.2d 593, 610 (10th Cir. 1986)). In *Kyles*, the prosecution suppressed evidence that would have cast an unfavorable light on a murder investigation; specifically, proof that informant Beanie, similar to Scarpa here, guided the investigation to shift suspicion away from himself and onto the defendant. Reversing the conviction, the Court made clear that such evidence was "material," and thus intrinsically relevant:

> Beanie's various statements would have raised opportunities to attack ... the thoroughness and even the good faith of the investigation.... Their disclosure would have revealed **a remarkably uncritical attitude on the part of the police**.
>
> ***
>
> [T]he defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked **the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted**....
>
> ***

> By demonstrating the detectives' knowledge of Beanie's affirmatively self-incriminating statements, the defense could have laid the foundation for **a vigorous argument that the police had been guilty of negligence**.... Since the police admittedly never treated Beanie as a suspect, the defense could thus have used his statements **to throw the reliability of the investigation into doubt and to sully the credibility of Detective Dillman, who testified [for the State at trial]**.
>
> The admitted failure of the police to pursue these pointers toward Beanie's possible guilt ... would have supported the defense's theory that **Beanie was no mere observer, but was determining the investigation's direction and success[, thus creating tremendous] potential for damage from using Beanie's statement to undermine the ostensible integrity of the investigation....**

115 S. Ct. at 1571-72 (Emphasis supplied). Plainly, then, the "Scarpa/DeVecchio" evidence was equally relevant to attack the *bona fides* of Malpeso's investigation. The lower courts' contrary ruling directly clashes with *Kyles*.

Further, the excluded proof would have ignited a powerful argument that the testifying agents were seeking convictions to vindicate (i) the tainted investigation and the "Colombo Squad" in general, (ii) their fallen comrade, Agent DeVecchio, in particular, and (iii) their own misconduct in facilitating and covering up Agent DeVecchio's wrongdoing. Put another way, the "Scarpa/DeVecchio" evidence would have exposed all the agents – and especially Agent Favo – to withering impeachment on the grounds of bias and motive. Courts have reversed convictions where trial judges rejected similar defense arguments. *See, e.g., United States v. Salerno*, 937 F.2d 797, 809 (2d Cir.), *modified on other grounds*, 952 F.2d 623, *amended on other grounds*, 952 F.2d 624 (1991), *rev'd on other grounds*, 505 U.S. 312, 112 S. Ct. 2503 (1992), *on remand*, 974 F.2d 231 (2d Cir.), *vacated on other grounds*, 8

F.3d 909 (1993); *United States v. Hitchmon*, 609 F.2d 1098 (5th Cir. 1979).

2. *THE EVIDENCE WAS NOT INADMISSIBLE UNDER RULE 403*

Beyond deeming the "Scarpa/DeVecchio" evidence irrelevant under Rule 401 – itself an error of constitutional magnitude – the Trial Court opined that it was barred by amorphous "[Rule] 403 implications." (A: 167) With little or no elaboration, the Second Circuit agreed. (12a-14a) This position fails.

First, where, as here, an accused offers relevant evidence for defensive purposes, *e.g.*, to negate an element of the charge(s), "prejudice [to] the government" is **not** a factor in the Rule 403 calculus. As the Second Circuit stated in *United States v. Aboumoussallem*:

> [T]he standard of admissibility when a criminal defendant offers ... evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword.
>
> ***
>
> **[R]isks of prejudice are normally absent when the defendant offers [such] evidence ... to prove some fact pertinent to the defense**.... In such cases the **only** issue arising ... is whether the evidence is relevant to the existence or non-existence of some fact pertinent to the defense.

726 F.2d at 911-912 (Emphasis supplied) (Footnotes and citations omitted); *Government of the Virgin Islands v. Carino*, 631 F.2d at 230 ("E]vidence produced by the defense cannot have a prejudicial effect to the defendant, and there should be no balancing of prejudice to the government") (Citations and internal quotes omitted). Thus, in affirming here, the Second Circuit jettisoned its own precedent.

Second, with respect to the government's purported trial management and jury confusion concerns – *i.e.*, the fear that

the trial would disintegrate into a collateral Aminitrial" on the "Scarpa/DeVecchio" imbroglio – we suggest a simple answer: **two prior trials involving the very same issue (*Cutolo* and *Victor M. Orena*) went off without a hitch**. Hence, the only real risk of prejudice or confusion here was the risk of an **acquittal**. Obviously, that concern is not cognizable under Rule 403.

Third, any theoretical risk of prejudice or confusion could have been cured by a simple limiting instruction – the kind that is routinely given when the government introduces, for example, Rule 404(b) evidence. Of course, juries are presumed to follow such instructions. *See, e.g., Old Chief*, 117 S. Ct. at 658 (O'Connor, J., dissenting) (citing *Shannon v. United States*, 512 U.S. 573 (1994)). Indeed, Judge Korman gave one in the *Victor M. Orena* trial that more than adequately protected the government's interests:

> The fact that Special Agent DeVecchio may have been guilty of gross misconduct, which may have even amounted to a violation of the criminal laws, or that F.B.I. agents should have reported their suspicions of his misconduct earlier, would not provide a basis for finding any of these defendants not guilty, if the evidence persuades you that they are guilty of the crimes charged beyond a reasonable doubt.

(A: 93)[2]

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2 In fact, juries are routinely called upon to make far more subtle and complex distinctions than would have been required here. In narcotics cases, for example, jurors are frequently asked to consider evidence of prior drug sales – often strikingly similar to those on trial – for the purpose of establishing background, motive or intent, but **not** substantive guilt. *See, e.g., United States v. Teague*, 93 F.3d 81, 84 (2d Cir. 1996); *United States v. Pitre*, 960 F.2d 1112, 1117-20 (2d Cir. 1992); *United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir. 1990), *cert. denied*, 499 U.S. 940, 111 S. Ct. 1397 (1991). Given the obvious difficulty of compartmentalizing such evidence, it is folly to suggest that Malpeso's jury could not have performed a similar gymnastic here.

Fourth, and more fundamentally, because the "Scarpa/DeVecchio" evidence was of the utmost relevance and importance to the defense, it **could not** have been prejudicial or confusing within the meaning of Rule 403. As one Court has put it, "relevant evidence is inherently prejudicial; but it is only **unfair** prejudice, **substantially** outweighing probative value, which permits exclusion of relevant matter under Rule 403." *United States v. McRae*, 593 F.2d 700, 707 (5th Cir.), *cert. denied*, 444 U.S. 862, 100 S. Ct. 128 (1979) (Emphasis supplied); *accord Old Chief*, 117 S. Ct. at 656 (O'Connor, J., dissenting) (collecting cases). Similarly, as recognized in *United States v. Blum*, 62 F.3d 63 (2d Cir. 1995), "given the importance of the ... testimony to the defense, **whatever confusion that may have resulted from its admission would have to have been overwhelming to satisfy Rule 403's balancing test**." *Id.* at 68 (Emphasis supplied) (*citing Harvey*, 547 F.2d at 723). Put simply, the government did not begin to approach such a showing here.

By any measure, then, the Trial Court further erred in precluding the "Scarpa/DeVecchio" evidence under Rule 403 – an error that gutted Malpeso's defense and his right to a fair trial.

II. MALPESO'S SENTENCE MUST BE VACATED BECAUSE U.S.S.G. § 1B1.2(d) IS UNCONSTITUTIONAL

Malpeso's 95 year sentence was driven by the Count One "War" conspiracy conviction. As noted, that Count charged him with conspiring to murder multiple but **unnamed** "members of the Persico faction." (A: 65-66) Accordingly, Guidelines § 1B1.2(d) controlled the calculation of Malpeso's sentence. (A: 237) That Guideline states:

> A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

In the absence of a special verdict, the District Court turned to § 1B1.2(d)'s Application Note 5 to determine the object(s) of the Count One conspiracy; *i.e.*, to decide which of the unnamed Persico Amembers" Malpeso had allegedly conspired to kill. (A: 237) Application Note 5 provides:

> Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, **were it sitting as a trier of fact**, would convict the defendant of conspiring to commit that object offense.

(Emphasis supplied)

Employing the beyond a reasonable doubt standard mandated by Application Note 5, the District Court then concluded that Malpeso had conspired not only to commit the McLaughlin/Norden shootings, but also to kill, *inter alia*, Matteo Speranza and his two employers. (A: 230-37, 509) Importantly, **the District Court reached this conclusion even though the jury had refused to convict on the substantive, Speranza-related counts under the very same reasonable doubt standard**. Not surprisingly, the District Court's finding dramatically increased Malpeso's sentence, boosting his offense level from approximately 28 to approximately 47, subject to further enhancements and multiple count adjustments. (A: 238-43, 264-66, 507-09) When coupled with a criminal history score of III, this translated into a sentence of life imprisonment. (A: 243)

Relying upon cases from the Ninth and Tenth Circuits, we argued below that § 1B1.2(d), as interpreted by Application Note 5, runs afoul of the Sixth Amendment by impermissibly diluting the function of the jury. *See United States v. Garcia*, 37 F.3d 1359, 1371 n.4 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1699 (1995); *United States v. Bush*, 70 F.3d 557, 561-62 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 795 (1996). Joining

the Third, Fifth, Seventh and Eleventh Circuits, the Court of Appeals disagreed and upheld the Guideline's constitutionality. (21a-24a); *see United States v. Conley*, 92 F.3d 157 (3d Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1244 (1997); *United States v. Manges*, 110 F.3d 1162, 1179 n.16 (5th Cir. 1997); *United States v. Edwards*, 105 F.3d 1179 (7th Cir.), *petition for cert. granted on this issue*, 118 S.Ct. 334 (Oct. 20, 1997); *United States v. Ross*, 131 F.3d 970, 989-95 (11th Cir. 1997). Because this Court's decision in *Edwards* will resolve this issue, we respectfully ask the Court to reserve decision on Malpeso's petition pending *Edwards*' outcome.

CONCLUSION

This petition should be granted.

Respectfully submitted,

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